BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DUANE A. BOLING Claimant V. **SPIRIT AEROSYSTEMS, INC.** Respondent AND **INSURANCE CO. OF THE STATE OF PENNSYLVANIA** AND **HARTFORD CASUALTY INSURANCE CO.** Insurance Carrier	)	Docket No. 1,073,416

ORDER

Respondent requests review of the June 19, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Paul V. Dugan, Jr., of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from June 11, 2015, with exhibits attached; Claimant's Discovery Deposition from May 7, 2015, and the documents of record filed with the Division.

ISSUES

The ALJ found claimant's dermatitis arose out of and in the course of his employment with respondent. The ALJ found the date of accident to be December 9, 2014, the date claimant was taken off work by Dr. Shackelford, and that claimant provided

timely notice to respondent. The ALJ ordered respondent to pay medical bills related to claimant's skin condition; designated Dr. Shackelford as the authorized treating physician; ordered temporary total disability compensation paid at $594 per week beginning December 10, 2014, and continuing until claimant is released to return to work, has been offered accommodated work within temporary restriction, has attained maximum medical improvement or until further order.

Respondent appeals, arguing claimant failed to prove his medical condition arose out of the two-week exposure to machine oil or that such exposure was the prevailing factor in causing the medical condition. Respondent also argues notice was not provided in a timely or sufficient manner. Therefore, the ALJ's Order should be reversed.

Claimant contends the ALJ's Order should be affirmed.

Issues on appeal:

1. Was the alleged chemical exposure the prevailing factor in causing claimant's medical condition?

2. What is the date of injury by repetitive trauma?

3. Was notice provided in a timely and sufficient manner to respondent?

FINDINGS OF FACT

Claimant testified he has worked for respondent for 37 years as a machinist. His job was running a duplicator router, which is a large machine powered by a motor. He testified that during the course of his employment with respondent, he developed a skin rash on his face and scalp. Claimant testified at his deposition that he first noticed the rash on his face in September 2014 and, as time when on, it gradually spread to his neck, arms, chest, shoulders and back, and it worsened.

Claimant testified he told his co-workers about his rash, but did not report it to any supervisor at that time. Claimant reported the rash to his supervisor around November 2014, and, when asked why he waited so long, he testified that the rash was getting so bad that Debbie Smith, one of the managers, saw the rash and suggested he see a dermatologist. Claimant testified Ms. Smith did not ask what happened to him, nor did his manager Gary Payne. Mr. Payne never said anything about the rash. Claimant later testified his conversation with Ms. Smith took place sometime between September 2014 and October 2014 before he met with the dermatologist. Claimant indicated he was already seeing a physician for his rash, but he did not mention this to Ms. Smith. Claimant testified that although he did not tell respondent what he thought caused his rash, he felt it might have been the oil. Claimant relayed his concern to his co-workers.

Claimant testified the oil started to bother him when maintenance came in to speed up the machines by making the oil flow faster, which caused the oil to spurt out and fog over the machine. Claimant indicated the fog was actually fumes from the burning oil. Claimant indicated that when the oil was at its highest point running through the machine and causing a fog, it pretty much drenched him and he had to clean himself up before lunch and when he got home. Claimant did not wear any kind of protective gear to cover his face, neck or ears. He always wore long pants or jeans. Claimant indicated he talked with Mr. Payne about the fog, but maintenance would not turn the machine down enough for it not to bother claimant. He testified after he complained of the fog being a safety hazard, maintenance made an adjustment. Claimant does not remember when this took place. He testified at the preliminary hearing that he thought this might have taken place in June 2014. Claimant testified it took two weeks of oil exposure to develop his rash. Claimant indicated that even though the oil flow was reduced, his rash got worse.

The first medical recording of claimant's skin condition was on June 18, 2014, from Dr. Kortje, claimant's personal physician. At this time, claimant thought his skin condition might have been from sleeping on an old couch, but he also thought it could have been the oil. Claimant testified he did not discuss his work conditions with Dr. Kortje. However, claimant testified at his deposition on May 7, 2015, that the first time he was advised that his rash was work-related was by Dr. Kortje, in June 2014.[1] Claimant was given a steroid injection and was sent to a dermatologist, Dr. Passman, who thought claimant had chronic dermatitis and prescribed a cream. The cream prescribed by Dr. Passman did not help claimant's condition.

Claimant's has no history of skin problems. Claimant was given a diagnosis regarding his rash and was told it was not related to his oil exposure. When claimant was not getting any better, claimant sought a second opinion with Krista Shackelford, M.D., a dermatologist, in September 2014. Claimant also met with Skye Lacey, physician assistant to Dr. Shackelford, on October 22, 2014.

At the October 22, 2014, visit, claimant voiced concern about a skin rash he had been dealing with for the last five months. Claimant indicated the rash started on his face and spread to his torso and upper extremities. He had no problems with the rash below the waist. He had moderate itching and, despite having a steroid injection five months prior to this visit, there had been no improvement in the rash.

Ms. Lacey diagnosed subacute lupus, considered contactant versus erythema multiforme. Claimant was prescribed medication and instructed to wear a hat and practice strict sun protection. Dr. Shackelford agreed with this diagnosis and treatment plan. A portion of claimant's skin was taken for testing to confirm the diagnosis.

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[1] Claimant's Discovery Depo. at 34.

Claimant was taken off work for the first time on December 9, 2014, by Dr. Shackelford. Claimant continued to worsen and on December 23, 2014, Dr. Shackelford diagnosed granulomatous dermatitis and chronic perivasculitis as a result of his work activities for respondent. Dr. Shackelford indicated the prevailing factor in causing the injury and need for medical evaluation and/or treatment was the exposure to machine oil at claimant's place of employment. She made treatment recommendations of topical steroids, antihistamines, oral steroids (discontinued), plaquenil (discontinued), and daspsone. Finally, as of December 9, 2014, she recommended claimant avoid chemical exposure. Dr. Shackelford's diagnosis was determined by a patch test, where oil was applied to the inside of claimant's thigh and a band-aid placed over it for two weeks. During this two weeks claimant developed a rash in this area. Claimant alleges this was the first time claimant was told that the oil exposure at work was the cause of his condition. Claimant reported this to Gary Payne and asked for a MSDS report which provides information regarding the chemicals used in the oil. Claimant submitted the report to respondent from Dr. Shackelford and claimant was taken off work.

During his time off claimant filed for FMLA, indicating on his paperwork he had a skin rash from oil exposure and was being treated by a dermatologist. Claimant's request was approved and he received 12 weeks FMLA. Claimant returned to work on January 13, 2015, and, at this time, he went on FMLA. However, during claimant's FMLA leave, claimant's condition worsened. Claimant could not answer why he filed for FMLA instead of workers compensation, except no one told him he should. It was only after he was told his skin rash was related to his work that claimant obtained an attorney and filed a workers compensation claim. Claimant is still considered an employee of respondent, but he is currently off work on medical leave.

Claimant met with Dr. Shackelford several times. On February 25, 2015, claimant had fading pink patches on his face and throughout his scalp and fading pink to red to violaceous patches coalescing into larger plaques on his forearms, hands, arms and torso. Some of the areas on the arms appeared punched out or pitted. Ms. Lacey opined, and Dr. Shackelford agreed, that claimant did not appear to be improving. Claimant was instructed to continue with his prescribed medication and was kept off work until May 15.

On March 25, 2015, claimant appeared to show some improvement. Claimant was instructed to continue with his medications and to return in a month. In an April 28, 2015, letter, Dr. Shackelford and Ms. Lacey reported that claimant had been a patient since October 2014, suffering from granulomatous dermatitis, which they determined was related to chronic exposure to oil at his job.

Claimant acknowledged that the very first time he expressed to someone in a management position at respondent that the rash may have been related to the exposure to the oil was when he completed the application for FMLA. This event took place in December 2014 when he was taken off work. Later testimony indicates respondent did not learn of claimant alleging his rash was work-related until the end of the 12 week FMLA

period when claimant's attorney sent them the information necessary to file a workers compensation claim.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(e)(f)(1)(A) states:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
> In no case shall the date of accident be later than the last date worked.
> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g) states:

(g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2014 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
Notice may be given orally or in writing.
(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury;

> (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The medical evidence in this record supports claimant's contention that he suffers from a skin rash stemming from exposure to oil at his job with respondent. The rash first appeared shortly after a machine near claimant began emitting an oil mist which covered the machinery near claimant and also claimant himself. It was during the two-week period when this malfunction occurred that claimant's rash first appeared. The medical information from Dr. Shackelford supports claimant's contention that his rash condition stems from that exposure. Dr. Shackelford's medical reports identify the oil exposure as the cause of claimant's granulomatous dermatitis.

Respondent contends claimant failed to provide timely notice of his repetitive trauma. The ALJ found claimant timely advised respondent of the repetitive trauma after determining the date of accident was December 9, 2014, the date Dr. Shackelford diagnosed the condition as work-related and the date she first took claimant off work. With a date of accident on December 9, 2014, claimant's notice to respondent when he asked for the oil sample and the MSDS sheet would be timely.

However, this Board Member notes the date of injury statute, K.S.A. 2014 Supp. 44-508(e) has very specific criteria for determining the date of injury in repetitive trauma situations. Here, claimant has identified two possible time frames during which a date of injury could be identified. The December 2014 date found by the ALJ is one possible time frame. However, claimant testified at his deposition on May 7, 2015, that the first time he was advised that his rash was work-related was with Dr. Kortje, in June 2014.[2] This results in a date of accident in June 2014.

Pursuant to K.S.A. 2014 Supp. 44-520, notice is required within 20 days of the date of injury by repetitive trauma. There is nothing in this record to support the giving of notice by claimant within 20 days of June 2014. The notice provided by claimant does not satisfy the requirements of K.S.A. 2014 Supp. 44-520. The award of benefits by the ALJ is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[2] Claimant's Discovery Depo. at 34-35.

[3] K.S.A. 2014 Supp. 44-534a.

as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed. Claimant has failed to prove that he provided timely notice of the injury by repetitive trauma suffered while working for respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones dated June 19, 2015, is reversed.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

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HONORABLE GARY M. KORTE
BOARD MEMBER

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Gary K. Jones, Administrative Law Judge